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No.

In the
Supreme Court of the United States

ROGER D. COWAN,

Petitioner,

v.

MARK WILKINSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, for purposes of exhaustion and default in a federal habeas action brought pursuant to 28 U.S.C. §2254, it is relevant that, during his or her state collateral attack on a conviction, a petitioner was not informed of his or her right to file a response/objection to appointed counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987)?

2. Whether, when a state appellate court reviews the record as a foundation for granting appointed counsel's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), that court's review is a full merits review such that it preserves each and every issue raised in the trial court for purposes of a federal habeas corpus action brought pursuant to 28 U.S.C. §2254?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on November 1, 2000.

OPINION BELOW

The November 1, 2000, decision of the United States Court of Appeals for the Seventh Circuit is published at 231 F.3d 347 (7th Cir. 2000). A copy of this decision is included in the appendix to this petition. The January 3, 2001 order of the Seventh Circuit which denied Warden Cowan's Petition for Rehearing and Suggestion for Rehearing En Banc is reported at 2001 U.S.App. LEXIS 154 (7th Cir. January 3, 2001). A copy of this order is also included in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on November 1, 2000, and rehearing was denied on January 3, 2001. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The United States District Court for the Northern District of Illinois, Eastern Division, asserted jurisdiction under 28 U.S.C. § 2254. The United States Court of Appeals for the Seventh Circuit exercised jurisdiction under 28 U.S.C. §§ 1291 and 2253. Wilkinson had appealed from a final judgment of the District Court which denied his petition for a writ of habeas corpus by a person in state custody.

An Illinois jury convicted Wilkinson of first degree murder and concealment of a homicidal death. He was sentenced to consecutive terms of imprisonment of 70 years and 10 years, respectively, for those crimes. On direct appeal, the Illinois Appellate Court, First District, affirmed the convictions and the sentence for murder but reduced the 10-year sentence for concealment of a homicidal death to five years. *People v. Wilkinson* (unpublished order No. 1-92-4379, issued November 1, 1995). The Illinois Supreme Court denied Wilkinson's petition for leave to appeal on January 31, 1996.

On October 19, 1995, Wilkinson filed a petition for relief pursuant to the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1, et seq.). Wilkinson raised 17 issues in that petition, including an allegation that he was denied the effective assistance of counsel because trial counsel failed to adequately review the coroner's autopsy report of the victim and/or tender that report to Wilkinson. He alleged that the autopsy report contained errors which call into question the identity of the subject of the autopsy and validity of the coroner's finding regarding the cause of death. As permitted by the Illinois Post-Conviction Hearing Act, the trial court dismissed the

petition, without appointing counsel or holding a hearing, as being frivolous. On appeal from this summary dismissal, Wilkinson's appointed counsel filed a motion to withdraw as counsel and concomitant brief pursuant to this Court's opinion in *Pennsylvania v. Finley*, 481 U.S. 551 (1987). On February 26, 1997, the Illinois Appellate Court, First District, granted the motion to withdraw and affirmed the trial court judgment which had dismissed the post-conviction petition. *People v. Wilkinson* (unpublished order No. 1-95-4229, issued February 26, 1997). In his *pro se* petition for leave to appeal to the Illinois Supreme Court, Wilkinson presented, in summary fashion, the same issues which had been raised in the post-conviction petition. The Illinois Supreme Court denied Wilkinson's petition for leave to appeal on June 4, 1997.

On June 3, 1998, through counsel, Wilkinson filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Illinois. That habeas petition raised eight claims of constitutional error, several of which subdivided into multiple allegations. In his answer to the petition, Cowan alleged that those issues which had been presented in Wilkinson's post-conviction action were defaulted for federal habeas purposes because those claims had not been presented to the Illinois Appellate Court. On December 14, 1998, the district court denied Wilkinson's habeas petition. In doing so, the district court agreed that those issues presented only in the state post-conviction proceedings had been defaulted. The district court thereafter denied Wilkinson's application for a certificate of appealability.

The United States Court of Appeals for the Seventh Circuit granted a certificate of appealability on the sole issue of whether Wilkinson was denied the effective assistance of trial counsel due to counsel's failure to adequately investigate and disclose to Wilkinson the autopsy report. On appeal, again Cowan asserted that the ineffective assistance issue was defaulted. In support of this argument, Cowan noted that motion to withdraw filed by Wilkinson's appointed counsel had affirmatively stated that the post-conviction petition did not allege any facts which gave rise to a claim of a constitutional error and that, therefore, there were no appealable issues. Cowan also noted that Wilkinson had not filed any *pro se* pleading in opposition or response to appointed counsel's motion to withdraw. The Seventh Circuit found that the claim was not defaulted. As a basis for that holding, that court stressed that, in reaching its decision, the Illinois Appellate Court had stated that it had conducted a careful review of the record and had found no issues of arguable merit. The Seventh Circuit held that this language established that the state court had made a merits judgment on every issue presented in the post-conviction petition sufficient to preserve each of those issues for federal habeas review, although none of them had been specifically mentioned. The Seventh Circuit also stressed the fact that Wilkinson had, apparently, not been told of his right to respond to the motion to withdraw. The Seventh Circuit then remanded the case to the district court for a determination of the ineffective assistance claim.

Cowan filed a petition for rehearing with a suggestion for a rehearing en banc. The petition for rehearing was denied on January 3, 2001.

On remand, Cowan filed a motion to stay the proceedings pending a petition for writ of certiorari to this Court. The district court denied that motion. Cowan filed his supplemental answer, addressing the ineffective assistance claim, with the district court on February 23, 2001.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted Because The Seventh Circuit's Holding In This Habeas Case Conflicts With The Established Principles Of Law That A *Pro Se* Defendant Is Not Entitled To Special Treatment And That A Court's Review Of A Record For A Specific Limited Purpose Does Not Constitute, For Default Purposes, An Opinion On The Merits Of Issues Raised.

A person in custody pursuant to the judgment of a state court has the right to seek redress in a federal court through an application for a writ of habeas corpus alleging that he or she is in custody in violation of the Constitution, laws or treaties of the United States. *See* 28 U.S.C. §2254(a). However, federal habeas is not an ordinary error-correcting writ; rather, federal habeas is superimposed on the multi-layered and multi-faceted levels of criminal trial and appellate procedures and is an extraordinary remedy. *Verdin v. O'Leary*, 972 F.2d 1467, 1473 (7th Cir. 1992); *Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989) (citing *Braden v. 30th Judicial Circuit*, 410 U.S. 484, 490-91 (1973)). "The junction where federal habeas power intersects with state criminal processes is enswathed in a mutuality of respect between sovereigns." *Nadworny*, 872 F.2d at 1096. Therefore, under the prin-

ciple of comity, a federal court will not address an otherwise cognizable issue in habeas unless the state is first accorded the opportunity to protect the federally-assured interests of its criminal defendants. *Id.* (citing *Castille v. Peoples*, 489 U.S. 346 (1989), *Rose v. Lundy*, 455 U.S. 509, 518-20 (1982) and *Duckworth v. Serrano*, 451 U.S. 1, 4 (1981)). Indeed, "[i]t would be unseemly in our dual system of government for the federal courts to upset a state-court conviction without affording to the state courts the opportunity to correct a constitutional error." *Verdin*, 972 F.3d at 1473 (quoting *Duckworth v. Serrano*, 454 U.S. 1, 4). The Seventh Circuit has recognized that once a petitioner files a post-conviction proceeding, he is required to, at least, appeal the denial of those claims to the intermediate appellate court in order to avoid the effect of procedural default. *Cawley v. DeTella*, 71 F.3d 691, 695 (7th Cir. 1995); *Jenkins v. Gramley*, 8.F.3d 505 (7th Cir. 1993). Of course, this Court has recently made it clear that, in order to avoid procedural default, a habeas petitioner must first have also presented his issues to the highest state court if discretionary review to that court is available. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Moreover, an issue is not exhausted when it has been presented for the first time in an application for discretionary review by a state's highest court. *Castille v. Peoples*, 489 U.S. 346, 351 (1989). In sum, in order to properly exhaust his claims, and thus preserve them for federal habeas review, a petitioner must present his issue at each level of the state court system. *See Lines v. Larkins*, 208 F.3d 153, 159 (3rd Cir. 2000) (citing *O'Sullivan v. Boerckel*, 526 U.S. 838) (to be exhausted, issue must be presented at each level of appeal); *Doctor v. Walters* 96 F.3d 675, 678 (3rd Cir. 1996) (citing *Anderson*

v. Harless, 459 U.S. 4 (1982) and *Picard v. Connor*, 404 U.S. 270 (1971)) (to satisfy the exhaustion requirement petitioner must present his claim to each level of the state courts); *Wayne v. Missouri Board of Probation and Parole*, 83 F.3d 994, 998 (8th Cir. 1996) (claim exhausted after one full round of state litigation).

There is no doubt that Wilkinson did not present to the Illinois Appellate Court the ineffective assistance of counsel claim which was raised in his federal habeas petition. In fact, through counsel, Wilkinson affirmatively disavowed that claim. On appeal from the dismissal of Wilkinson's state post-conviction petition (which contained the ineffective assistance claim in question) appointed counsel filed a motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Counsel asserted that the petition failed to allege any facts which give rise to a claim of a constitutional deprivation and that, therefore, there were no appealable issues. Logically, it would seem that such an action would be at least as harmful to Wilkinson's subsequent attempts to raise the claim in federal habeas as the simple failure to present the claim to the state appellate court. Yet, the Seventh Circuit determined that the issue had not been defaulted. In support of this ruling, it apparently sought to excuse Wilkinson's failure to present the issue to the Illinois Appellate Court. The Seventh Circuit noted that Wilkinson had been served with a copy of the motion to withdraw but did not file a *pro se* response to the motion or a *pro se* merits brief. *Wilkinson v. Page*, 231 F.3d 347, 349, 351 (7th Cir. 2000). That court recognized that "[h]ad the appeal proceeded to briefing on the merits, Wilkinson (or his attorney) would have been obliged to develop the

basis for his ineffectiveness claim and thus to give the appellate court an adequate opportunity to evaluate the merits of that claim" and that "if Wilkinson had omitted to do so, he could be said to have defaulted on the claim." *Wilkinson*, 231 F.3d at 350-51. However, the Seventh Circuit went on to stress that Wilkinson had not been notified "that he had a *right* to respond to the motion, let alone an *obligation* to do so if he wished to preserve the claims for further review." *Id.* at 351. It found, therefore, that Wilkinson could not be faulted for not filing a *pro se* pleading and that he could not be charged with a procedural default under these circumstances. *Id.* at 351-52.

There are at least two flaws in this logic. First, it has often been held that a *pro se* defendant's lack of legal knowledge does not excuse a procedural default. *See, e.g., Freeman v. Page*, 208 F.3d 572, 575 (7th Cir. 2000) (imprisoned habeas petitioner was responsible for late filing of state post-conviction petition even though petitioner might not have known that time for filing the state action had recently been shortened); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (petitioner's lack of knowledge of one year time limitation for filing federal habeas action under 28 U.S.C. §2244(d) as amended did not warrant equitable tolling); *Hannah v. Conley*, 49 F.3d 1193, 1197 (6th Cir. 1995) (*pro se* status and lack of legal knowledge did not establish cause to excuse petitioner's failure to raise claims in state court); *Rodriguez v. Maynard*, 948 F.2d 684, 688 (10th Cir. 1991) (*pro se* petitioner's lack of awareness and training on legal issues did not establish cause for his failure to raise issue in an earlier petition); *Williams v. Arkansas*, 927 F.2d 409, 410 (8th Cir. 1991) (*pro se* status and educational background

do not establish sufficient cause for failing to raise issues in state court); *Whiddon v. Dugger*, 894 F.2d 1266, 1267 (11th Cir. 1990) (petitioner's non-lawyer status and alleged poor advice from an inmate law clerk did not excuse petitioner's state procedural default); *Hughes v. Idaho State Board*, 800 F.2d 905, 909 (9th Cir. 1986) (*pro se* petitioner's ignorance is not sufficient to satisfy cause under cause and prejudice test); *see also, People v. Haynes*, 174 Ill.2d 204, 673 N.E.2d 318, 339 (1996) (fact that defendant was acting *pro se* did not excuse failure to properly preserve issue for appeal); *People v. Long*, 39 Ill.2d 40, 233 N.E.2d 389, 391 (1968) (same). Second, as the Seventh Circuit recognized, this Court's opinion in *Pennsylvania v. Finley* itself indicated that such notice to a defendant is not constitutionally required. *Wilkinson*, at 351. In *Finley*, this Court allowed a procedure through which a defendant's state post-conviction appeal was dismissed after appointed counsel informed the appellate court that he found no meritorious issues and the appellate court, after an independent review of the record, agreed. *Finley*, 481 U.S. 551. There was no indication in *Finley* that the defendant had been notified of counsel's conclusion before the appellate court dismissed the appeal. *Id.* Moreover, this Court stressed that the defendant had gotten the independent review of the record by competent counsel required by state law and that the Constitution did not require more. *Id.* at 559. Thus, contrary to the Seventh Circuit's apparent assertion, the fact that Wilkinson may have been unaware of the law of procedural default for purposes of further state review, or for federal habeas review, does not excuse his failure to present his issues to the state appellate court when counsel found that he could not do so in good faith.

In support of its conclusion, the Seventh Circuit also found that the presentation of a motion to withdraw as counsel under *Finley*, in conjunction with the state appellate court's review of the record when it determined whether to grant the motion, resulted in a ruling on the merits by that appellate court, with regard to all of the issues raised in the state collateral action. *Wilkinson*, 231 F.3d at 351-52. The Seventh Circuit stressed that, when it granted counsel's motion to withdraw, the state appellate court stated that "[it had] carefully reviewed the record in this case and the aforesaid brief in compliance with *Pennsylvania v. Finley* and found no issues of arguable merit." *Id.* at 349, 351. The Seventh Circuit found that this phrase established that the appellate court had conducted a merits review of all of the issues raised in the post-conviction petition sufficient to meet the exhaustion requirement. *Id.* at 351. There is precedent which teaches that an issue can be regarded as exhausted when, although it was not specifically raised, a state appellate court nonetheless imparts a ruling on the issue. *Gentry v. Lunsdown*, 175 F.3d 1082, 1083 (8th Cir. 1999); *Walton v. Caspari*, 916 F.2d 1352, 1365 (8th Cir. 1990); *Sandstrom v. Butterworth*, 738 F.2d 1200, 1206 (11th Cir. 1984). However, other precedent teaches that the appellate court here should not be considered to have given full consideration to the merits of every possible issue, or even every issue raised in Appellant's state post-conviction petition.

First, the cases just cited above do not support the Seventh Circuit's finding. In *Gentry*, it was concluded that the petitioner's issues had not been considered on the merits when the state courts had denied his state

habeas petition without explanation. In *Sandstrom*, the federal court of appeals found that the state appellate court had addressed the merits of that petitioner's constitutional claim when the petitioner had presented the necessary facts and the state court had specifically cited to controlling precedent on the issue from the United States Supreme Court. *Sandstrom*, 738 F.3d at 1206. Likewise, in *Walton*, the court of appeals found that the state court had addressed the merits of an equal protection claim when the state court addressed the factual basis for that petitioner's claim using equal protection precedent. *Walton*, 916 F.2d 1356-57. Conversely, in the instant case, neither the facts which allegedly support Wilkinson's claim nor any precedent regarding the merits of the claims was specified by the state appellate court.

Further, the Seventh Circuit and other courts have found that similar limited examinations of a record do not constitute an analysis on the merits sufficient to meet the exhaustion requirement. In Illinois, an issue which has not been properly preserved for appeal may be addressed as "plain error" if the facts of the case are closely balanced or if the claim involves fundamental error which denied the defendant a fair trial. *People v. Herrett*, 137 Ill.2d 195, 561 N.E.2d 1, 7-8 (1990). In addressing the second prong of this exception, a state court first determines if error occurred and then determines if any error rose to the level of plain error. *Herrett*, 561 N.E.2d at 8. Obviously, in order to determine if the alleged error occurred, the court must address the merits of the defendant's claim. Nevertheless, the Seventh Circuit has held that such review does not preserve the issue for habeas review. *Neal v. Gramley*, 99 F.3d 841,

844 (7th Cir. 1996). This is true although the claim in question had been specifically designated.

In cases which more closely track the circumstances here, courts have found that a similar general review of the record does not amount to a review of the merits of any issue sufficient to preserve the issue for federal habeas consideration. For instance, although it no longer does so, it was the practice of the South Carolina Supreme Court, in all capital cases, to conduct a review in favorem vitae (in favor of life) in which the court reviewed the entire record for error regardless of whether the error had been objected to. *Smith v. Moore*, 137 F.3d 808, 821 (4th Cir. 1998); *Matthews v. Evatt*, 105 F.3d 907, 912-13 (4th Cir. 1997). The Fourth Circuit has repeatedly held that such review did not constitute a review on the merits which preserved an issue later raised in federal habeas. *Smith*, 137 F.3d at 821; *Matthews*, 105 F.3d at 912-13. Likewise, in *Coe v. Bell*, 161 F.3d 320, 336 (6th Cir. 1998), the court of appeals held that the fact that, pursuant to state statute, the Tennessee Supreme Court must review "significant errors," whether or not they were raised by a defendant, does not preserve such issues for habeas review. Likewise, a state statute requires the Arizona Supreme Court to review the record in capital cases for fundamental error. *Poland v. Stewart*, 117 F.3d 1094, 1105-06 (9th Cir. 1997). Again, the court of appeals rejected a petitioner's claim that such general review of the record preserved an issue for consideration in federal habeas review. *Id.* Likewise, a state statute requires the North Carolina Supreme Court to conduct an automatic review of a death sentence and to reverse the sentence if it finds that the record did not support the jury's findings

of aggravating circumstances, that the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, or that the sentence was excessive or disproportionate to the penalty imposed in similar cases. *Fisher v. Lee*, 215 F.3d 438, 456 (4th Cir. 2000). The court of appeals ruled that this statute did not mean that the state court had addressed the merits of that petitioner's attack on certain statutory aggravating factors. *Id.* Thus, the fact that an appellate court conducts a review of the entire record in search of error does not constitute a ruling on the merits of any particular unspecified error. Indeed, it appears that there are members of this Court who agree with this statement of law. *See McCaskle v. Vela*, 464 U.S. 1053 (1984), O'Connor, J., joined by Rehnquist, J. and Burger, C.J., dissenting from denial of *certiorari* (disagreeing with ruling of appellate court that unspecified claims of ineffective assistance of counsel were preserved by other allegations of ineffective assistance because state court reviewed the entire record to address the claims raised).

This conclusion is also supported by the law regarding *Finley* motions and motions to withdraw on direct appeal under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). In support of its ruling, the Seventh Circuit cited to the analysis and explanation of *Anders* in *Penson v. Ohio*, 488 U.S. 75 (1988). *Wilkinson*, 231 F.3d at 351. First, it is not at all clear that the law of *Anders* is pertinent in the instant *Finley* situation. After all, the opinion in *Finley* itself rejects the application of *Anders* to collateral attack settings. *Finley*, 481 U.S. 551. Moreover, to the extent that the rule of *Anders* applies, the explanation of that case in *Penson* actually disproves the Seventh

Circuit's holding. In *Wilkinson*, the Seventh Circuit cited *Penson* for the proposition that when presented with a motion to withdraw as counsel, "once the appellate court decides that there is no non-frivolous issue for appeal, 'the court [may] proceed to consider the appeal *on the merits* without the assistance of counsel.'" *Wilkinson*, 231 F.3d at 351 (paraphrasing and quoting *Penson*, 488 U.S. at 80) (italics in *Wilkinson*) (underline added). In *Penson*, this Court also explained that if the appellate court "*concludes that there are nonfrivolous issues for appeal*, 'it must, *prior to decision*, afford the indigent the assistance of counsel to argue the appeal.'" *Penson*, 488 U.S. at 80 (paraphrasing and quoting *Anders*, 386 U.S. at 744) (emphasis added). An earlier case from this Court likewise stated that if a reviewing court concludes that there are non-frivolous issues to be raised, the court must appoint counsel to pursue the appeal and direct counsel to prepare an advocate's brief before the court decides the merits. *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 444 (1988). As this language clearly sets forth, the appellate court's analysis of whether there are any non-frivolous issues is a limited inquiry, is separate from, and comes before an appellate court actually considers the merits of any issue. This is true since, according to *Penson* and *McCoy*, the court is only allowed to consider the merits of an issue, whether with or without counsel, after it has made a frivolity determination. Moreover, in the latter case, if the court had already considered the merits of an issue, there would be no need to appoint counsel to argue the issue.

This conclusion is further supported by other language in *McCoy* and by a case on which this Court relied in

McCoy. In *McCoy*, this Court stated that to categorize an argument as "wholly frivolous" is the same as saying that the argument is "without merit," which is the same as saying that an appeal lacks any basis in law or in fact. *McCoy*, 486 U.S. at 439, n.10. In *McCoy*, this Court relied a great deal upon its earlier decision in *Ellis v. United States*, 356 U.S. 674 (1958). *Id.* at 437. *Ellis* dealt with the question of when the court of appeals should grant a petition for leave to appeal *in forma pauperis*. This Court noted that, under the appropriate statutory "good-faith" standard, the request of an indigent for leave to appeal *in forma pauperis* should be granted unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant. *Ellis*, 356 U.S. at 675. In doing so, this Court noted that "[t]he good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit." *Id.* at 674-75. In sum, a determination of whether an issue is frivolous is a very limited initial finding which cannot be regarded as a reasoned analysis of an issue on the merits. Thus, the Seventh Circuit's reliance on *Penson* was misplaced. In actuality, that case, and other precedent from this Court, support an opposite result.

In addition, the Seventh Circuit's logic creates the ironic situation that counsel who files a motion to withdraw as counsel under *Finley* will preserve more issues than counsel who files a brief but raises less than all of the issues raised in the collateral action. This provides an interesting conundrum for counsel appointed on appeal in state collateral actions. As noted above, the Seventh Circuit found that a *Finley* motion preserves, for habeas review, any and all issues raised in the state trial court

in the collateral action. *Wilkinson,* at 351. Thus, that Court found that when counsel says that there are no issues upon which to base an appeal, all of the issues raised below are preserved. On the other hand, were counsel to raise in the state appellate court only one or two of several issues contained in the trial court pleading, there is no question that only those one or two claims would be preserved. In short, counsel must either raise on appeal all of the issues presented in a petitioner's state collateral action or risk being less effective, for habeas purposes, than counsel who chooses to raise no issues on appeal. Thus, under this less is more logic, appellate counsel in a state collateral action seeking to zealously represent his client must either raise all or none of the claims raised below. This, of course, appears contrary to the well recognized law that counsel on appeal be allowed to concentrate on certain issues in order to more effectively present those claims. "'Experienced advocates from time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.'" *People v. Tenner*, 175 Ill.2d 372, 677 N.E.2d 859, 867 (1997) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). According to the Seventh Circuit, counsel must now choose whether to represent a defendant more effectively by winnowing the wheat from the chaff in the state appellate court or by preserving all issues for federal review.

The Seventh Circuit's opinion is also offensive to the appellate courts of the several states. State courts which conduct the proper limited frivolity analysis of a constitutional claim in a *Finley* situation may lose their comity-

based privilege to perform a full merits analysis of any issues which a defendant did not present to them, but which he or she later presents in federal habeas petition. A state court which wants its opportunity to address such claims will be forced to ignore the sworn statement of counsel and address completely the merits of *every* issue raised below.

In sum, the Seventh Circuit's ruling is flawed in several ways. First, it presumes that the laws of procedural default cannot be applied against a layman who has not been specifically advised of those laws. Next, the opinion wrongly concludes that a review of the record for a limited purpose should be regarded as an analysis of all issues on the merits. This is not true, generally, with regard to limited purpose reviews of records and, specifically, with regard to frivolity determinations in a setting of a motion to withdraw by appellate counsel. Also, it creates a situation in which appellate counsel who does less is, in some ways, actually more effective than counsel who does more. Finally, it forces state appellate courts to perform a full merits review of issues which were not submitted or briefed on appeal. In sum, the Seventh Circuit's opinion sets dangerous precedent in a very important area of federal habeas law. This Court's cases teach that the principles of default and the considerations of comity with which default is inextricably entwined are a major factor in federal habeas. The far-reaching implications of the Seventh Circuit's opinion on those concepts should be addressed by this Court.

CONCLUSION

For all the foregoing reasons, Petitioner, Roger D. Cowan, respectfully requests that this Court grant *certiorari* and reverse the opinion of the United States Court of Appeals for the Seventh Circuit which held that Mark Wilkinson had not defaulted his claim of the ineffective assistance of trial counsel.

Respectfully submitted,

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